

Westlaw83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 1

CIowa Law Review
October 1997***139 BEATING THE ODDS: READING STRATEGIES OF LAW STUDENTS ADMITTED THROUGH
ALTERNATIVE ADMISSIONS PROGRAMS**

Laurel Currie Oates [FN1]

Copyright © 1997 University of Iowa (Iowa Law Review); Laurel Currie Oates

When they enter law school, the odds are against them. Almost always persons of color and often from disadvantaged backgrounds, their LSAT scores are substantially lower than those of their classmates. As a result, these students, law students admitted through alternative admissions programs, have a by far less chance of success than their regularly admitted classmates. [FN1] Some of these students do, however, beat the odds. While most students who are admitted to law school under an alternative admissions program perform as their LSAT scores predict—in the bottom quartile of their class—a small number perform substantially better. Every year, some alternatively admitted students end their first year in the upper twenty-five percent, upper ten percent, and, at least occasionally, upper five percent of their class. [FN2]

Historically, these successes have been attributed to the students' personal characteristics. The students who succeed simply work harder than those who do not. Although this explanation is appealing in that it places responsibility for success on the student, it does not seem to be true. [FN3] Instead, what those of us who work with students admitted through *140 alternative admissions programs are beginning to recognize are differences in the way these alternatively admitted students approach what is the primary task in law school: reading judicial opinions. Even when the students have gone through the same orientation and tutoring sessions, the more successful students seem to read the assigned opinions differently than those students who are less successful.

The study reported in this Article explores these perceived differences. In particular, it looks at the way in which four students read judicial opinions assigned for class. Part I examines previous studies and essays on the way in which individuals read judicial opinions and law review articles. Part II describes this study, including the participants, the tasks that they were asked to perform, and the methods that were used to collect and analyze the data. The final two parts, Parts III and IV, set out the data and propose some conclusions that might be drawn from it.

I. The Literature

While the reading of statutes and judicial opinions is central to the practice of law, to date it has been studied very little. There have been only two studies and a handful of essays that have explored the ways in which legal readers read the law. [FN4]

In the only study that has compared the way in which experts and novices read judicial opinions, Mary A. Lundeborg had ten experts (eight law professors and two attorneys) and ten novices (individuals who were presumed to be good readers but who had no training in law) think aloud as they read a judicial opinion. [FN5] Not

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

FOR EDUCATIONAL USE ONLY

Page 2

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

surprisingly, in the two categories in which knowledge of the law was most likely to influence reading—use of context and evaluation—Lundeberg found significant differences. While *141 very few of the novices began their reading by noting the names of the parties, the date of the opinion, or the court and judge deciding the case, almost all of the experts did. [FN6] In addition, while very few of the novices evaluated the opinion, most of experts made statements agreeing or disagreeing with the court's holding or rationale or demonstrating a sophisticated knowledge of jurisprudence. [FN7]

There were, however, also differences in categories not so dependent on legal knowledge. The experts were more likely than the novices to preview the opinion and to reread it analytically, that is, to selectively reread or mark the text. [FN8] Similarly, the experts were more likely than the novices to engage in synthesis, that is, to merge the facts, rules, and rationale of the case or to spontaneously generate hypotheticals. [FN9] While three of the novices synthesized the elements of the case, none generated hypotheticals. [FN10] The only category for which there were not significant differences was underlining. [FN11] Table 1 provides Lundeberg's summary of her findings. [FN12]

Table 1: Lundeberg's Data

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Note. Each value represents the number of subjects who used a specific strategy, not the number of times a strategy was used. $n=10$ for each group.

*142 In the only other study on legal reading, Dorothy H. Deegan compared the way in which students in the upper and lower quartiles of their first-year class read, not judicial opinions, but a law review article. [FN13] In particular, she compared twenty students on two reading strategies: a default strategy and a problematizing strategy. [FN14] Four types of "moves" were associated with the default strategy: noting important details, paraphrasing, drawing conclusions, and noting an aspect of structure. [FN15] Two types of moves were associated with the problematizing strategy: problem posing and problem solving. [FN16]

What Deegan found were significant differences between the two groups. While students in the high performance group spent about 29.1% *143 of their time engaged in default strategies, [FN17] students in the low performance group used these strategies about 44.7% of the time. [FN18] In contrast, while students in the high performance group spent about 58.9% of their time engaged in problematizing, [FN19] the students in the low performance group spent only 40.3% of their time posing or solving problems. [FN20] In addition, Deegan found a significant difference between the two groups' abilities to solve problems. While the mean for the high performance group on the successful use of a problematizing strategy was 14.8, the mean for the low performance group was 6.3. [FN21]

Approaching legal reading from a different perspective, Martin Davies relied on his own experience as a legal reader in describing and theorizing about the differences in the ways experts and novices read judicial opinions. [FN22] According to Davies, at least two attributes distinguish legal readers: (1) their ability to supply legal contexts, and (2) the purposes for which they read cases. [FN23] In addition, Davies emphasized the importance of the reader in the reading of judicial opinions. [FN24] It is the reader who, by providing the context, gives the significance to particular opinions or to aspects of a single opinion. "The primary source of the common law is the text, and no text has meaning without a readership. There is no apodictic 'true legal meaning' . . . which exists like a Platonic ideal, independent of the process of understanding, and which readers struggle to grasp with varying degrees of success." [FN25]

Also relying on their own experiences, Elizabeth Fajans and Mary R. Falk describe their and others' attempts to teach legal reading. [FN26] The problem, according to these authors, is that most law students read denotatively. [FN27] They read to decode the text, to find or retrieve the controlling ideas, and to show the teacher that they "got" it, that they read the text correctly. [FN28] They do not ask such questions as: (1) Whose story the court is telling? (2) How is the court reading the law? (3) How is the court trying to obtain our assent to its position? or (4) What has the court omitted from its opinion? [FN29] To use Fajans and Falk's phrase, they do not "talk back to the text." [FN30] Thus, Lundeberg's study and the essays *144 suggest that there are differences in the ways in which experts and novices read judicial opinions. Experts are more likely than novices to use certain reading strategies, and experts

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 3

read opinions in different contexts and for different purposes than do novices. In addition, Deegan's study suggests that there are differences among novices and that these differences are correlated with first-year grades. [FN31] Students who use problematizing strategies more often and more successfully are more likely to get better grades than students who use the strategies less often and with less success. [FN32] The study reported in this Article builds on these prior studies and essays, looking to whether there is a correlation between the reading strategies used by first-year students admitted through an alternative admissions program and their first-year grades. Although the sample is small, the results suggest that there may be a correlation.

II. The Study

A. The Method of Collecting Data

Today, most research into learning falls into one of two categories: quantitative or qualitative. [FN33] Quantitative research assumes that variables can be identified, isolated, and quantified and is usually done by "behaviorists" seeking to objectively test a hypothesis. [FN34] In contrast, qualitative research assumes that variables are complex, interwoven, and difficult to measure and is most often done by "cognitive psychologists," who, instead of starting with a hypothesis, use their research to develop one. [FN35] Some of the more common types of qualitative research are surveys, case studies, interviews, and most recently, "think alouds." [FN36]

In this study, a think aloud was used as the primary method of data collection because it provides what many researchers believe is the most valid data on cognitive processes. [FN37] Because participants state their thoughts as they are thinking them, their reports are considered more accurate than reports obtained through introspection or post hoc questioning. [FN38]

*145 In addition to the think aloud, each participant was interviewed, and each of the student's casebooks and notes were analyzed to determine whether the strategies that they used during the think aloud were similar to those that they used in preparing for class. The interview was used for two purposes. The questions asked prior to the think aloud were designed to obtain information about the process that the students typically used to read material assigned for class; the questions asked after the think aloud were posed to obtain additional information about how the students read and about their views of text. The students' casebooks and notes were examined to cross check the data obtained during the think alouds and interviews, specifically, to determine whether the processes that students used and described appeared to be consistent with the ways in which they typically read materials assigned for class.

B. The Participants

The participants in this study were four law students admitted to a regional law school through an alternative admissions program. [FN39] In addition, a law professor, who had practiced for four years and taught for three years, served as a control—the "expert" legal reader. All four students entered law school with similar "numbers": LSAT scores between 142 and 146 [FN40] and undergraduate GPAs between 3.2 and 3.53. Once in law school, all four participated in the same summer-long orientation program, took the same classes with the same professors, and to varying degrees, participated in the same tutoring and review sessions. The two students with the lowest first-semester GPAs and the two students with the highest first-semester GPAs were selected from a group of eight volunteers. None of the students who participated were paid.

Two of the four students performed on their first-semester, first-year exams as the LSAT predicted: in the bottom quartile of the class. James, a twenty-five-year-old Asian American was in the bottom ten percent of his class at the end of the first semester, and Jackie, a forty-year-old African-American woman, was in the bottom twenty percent. In contrast, the other two students performed substantially better than their LSAT scores predicted. At the end of the first semester, Maria, a thirty-year-old Filipina, was in the top fifteen percent of the class, and William, a thirty-five-year-old Nigerian who has been in this country for about fifteen years, was in the top ten percent. [FN41]

*146 C. The Task

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 4

Table 2: Participants in the Study

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The five participants read a four-page section from a well-established Torts casebook. [FN42] The casebook authors begin the section by setting out section 35 of the Restatement (Second) of Torts (1965). [FN43] This "rule" is followed by a 1912 Maine Supreme Court case in which the issue was whether a woman who wanted to leave a religious sect had been falsely imprisoned when the leader of the religious sect treated her like a guest, allowing her to go ashore on several occasions, but would not give her access to the rowboat that she needed to quit "the yacht for good and all." [FN44] Following this case is a note in which the casebook authors describe more recent cases involving parents who "kidnapped" their children from "cults" for the purpose of deprogramming them [FN45] and by a second short false imprisonment case. [FN46] This particular section was selected because (1) the material was new to all five participants, (2) the material was representative of the type of material typically found in casebooks, (3) the text was of moderate difficulty, and (4) the cases were of high interest value and raised a number of issues.

The interviewer was with each of the participants for approximately two hours. The interviews took place in an office furnished with a table and comfortable chairs, a regular dictionary, a legal dictionary, and a variety of pens, highlighters, and paper. Participants were offered beverages and could take a break whenever they chose.

At the beginning of the session, the participants were trained to think aloud using an excerpt from another case. The participants were instructed to read the text aloud, stopping every sentence or two to state what they *147 were thinking. In addition, they were told that if they read for more than two or three sentences without stopping, the interviewer would interrupt them to ask what they were thinking. Once the participants became proficient at the think aloud process, the interviewer asked them to describe the processes that they typically used in reading and briefing cases. The participants were then asked to read the assigned text using the processes they typically used, but reading aloud, stopping every sentence or two to say what they were thinking.

After the participants had finished the think aloud and had taken a short break, they were interviewed to determine: (1) how they defined their role when they were reading and briefing cases; (2) whether they thought the cases were consistent with one another and the restatement section; (3) whether they agreed or disagreed with the courts' decisions and reasoning; and (4) how they viewed the texts that they read. In addition, students who did not prepare written briefs were asked to identify the legally significant facts, the rules, and the court's reasoning for each case.

The protocols and interviews were then transcribed and each statement coded. For example, the transcripts were coded to indicate each place an individual used one of the six strategies identified by Lundeborg [FN47] and to indicate the levels at which students read. [FN48]

*148 III. The Results

The data confirm, at least in part, Lundeborg's data. The expert, the law professor, used Lundeborg's six strategies more frequently than the novices, the students. The data also comport with Deegan's data. Those students who did better on their first-semester exams read differently than those who did not do as well. The differences were not, however, necessarily those that were expected. While the data collected from two of the students, William (high GPA) and Jackie (low GPA), suggest that high GPA students use reading strategies similar to those used by expert legal readers while low GPA students do not, the data collected from the other two students, Maria (high GPA) and James (low GPA) suggest other explanations for the differences. Table 3 summarizes the data.

A. The Professor

In reading the assigned materials, the professor used more of the strategies identified by Lundeborg and did more reading at the connotative and stereoscopic levels than did the students. For example, like Lundeborg's experts, when first handed the packet, the professor flipped through it, apparently noting the types of materials that it

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139

FOR EDUCATIONAL USE ONLY

Page 5

83 Iowa L. Rev. 139

(Cite as: 83 Iowa L. Rev. 139)

contained. In addition, before she began reading an opinion, she read the caption, noting the name of the court and the year of the decision. Later, after she began reading the opinion, she engaged in the types of analytical rereading, synthesis, and evaluation described by Lundeborg. Instead of simply paraphrasing what the court had stated, she questioned the text, making sure that she understood the facts and reconciling the rules set out in the case with the rules set out in the Restatement. She also used two strategies not noted by Lundeborg: (1) she tried to create a mental picture of what had happened in the case and (2) she tried to predict how the court would rule before reading the court's holding and rationale. The following excerpts, which set out the text in a regular type face and the professor's comments in italics, are representative.

Whittaker v. Sanford

110 Me. 77, 85 A. 399 (1912)

Savage, J. Action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case comes up on defendant's exceptions and a motion for a new trial.

Savage is the judge. This is an action for false imprisonment. The plaintiff recovered a verdict for \$1100. I just glanced back at the caption. In 1912, \$1100 would probably have been a significant amount.

The plaintiff had been a member of a religious sect which had colonies in Maine and in Jaffa, Syria, and of which the defendant was a leader. Some months prior to the alleged imprisonment, the plaintiff, while in Jaffa, announced her intention to leave the sect.

*149 Table 3

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*150 Ok. The court is setting out the facts.

The defendant, with the help of the plaintiff's husband, persuaded the plaintiff to return to the United States aboard the sect's palatial yacht, the Kingdom. The defendant promised the plaintiff that she and her children would be free to leave the ship any time they were in port. After their arrival in Maine, the plaintiff asked to be put ashore with her children and baggage and the defendant refused.

Ok. So the plaintiff is a woman wanting to leave a sect and the defendant is the leader of the sect. The false imprisonment occurred when the defendant refused to let the plaintiff go ashore with her children and baggage.

....
There was evidence that the plaintiff had been ashore a number of times, had been on numerous outings and had been treated as a guest during her stay aboard the yacht. According to the uncontradicted evidence, at no time did anyone physically restrain the plaintiff except for the defendant's refusal, once the plaintiff announced her decision to quit the yacht, to let the plaintiff use a small boat to take herself, her children, and her belongings ashore.

I'm sort of getting a visual image of the boat that she was in and out of . . . uh. . . the plaintiff had been ashore. I'm thinking about the elements that I just read (a reference to the Restatement section immediately before the case) and I'm trying to see how, I guess, frankly how I would decide the case on a certain level before I even want to know what Judge Savage thought. (pause) I need to look at the Restatement again. (Looks back to Restatement section.) Is the defendant acting to or with intent to confine the plaintiff? She got off the boat. That kind of bothers me. That results directly or indirectly in confinement. Maybe that's relevant here. The other is conscious of the confinement or is harmed by it. Given these facts, that bothers me too.

Perhaps more striking, though, was the professor's refusal to begin reading until she knew her purpose.

Interviewer. You can begin reading aloud whenever you are ready.

Professor. (Pause.) I just realized that I can't begin reading until I know why I am reading. Since I got out of law school, I don't just read cases. When I read, I am reading for a reason.

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139

FOR EDUCATIONAL USE ONLY

Page 6

83 Iowa L. Rev. 139

(Cite as: 83 Iowa L. Rev. 139)

*151 After discussing the purposes for which she could read the materials, the professor decided to read them to determine whether they could provide the basis for a legal writing assignment. Her comments during the think aloud reflect that she kept this purpose in mind as she read. Several times she interrupted her reading to comment on the issues that the cases and notes raised and her opinion as to whether they might make an interesting assignment. Thus, to use Davies's framework, the professor created her own context and then read the materials within that context.

B. William and Jackie

The ways in which William, one of the high GPA students, and Jackie, one of the low GPA students, read the text reflect the differences in ways in which Lundberg's experts and novices read cases. While William used many of the strategies used by the experts, Jackie used very few.

Although William did not preview the case, he did place it in context, reading the caption and noting the name of the court and the year of the decision. In addition, he did a substantial amount of rereading. Sometimes he reread a section because he was having difficulty understanding the section; at other times he reread a section because he wanted to mark portions of it that he thought were particularly significant, for example, a key fact or a rule. The following is an excerpt from William's think aloud.

Whittaker v. Sanford

110 Me. 77, 85 A. 399 (1912)

Savage, J. Action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case comes up on defendant's exceptions and a motion for a new trial.

So the defendant is the appellant and is appealing the verdict of \$1100.

The plaintiff had been a member of a religious sect which had colonies in Maine and in Jaffa, Syria, and of which the defendant was a leader. Some months prior to the alleged imprisonment, the plaintiff, while in Jaffa, announced her intention to leave the sect.

I need to reread this again. (Rereads sentence.) So just prior to the alleged imprisonment the plaintiff was in Jaffa and expressed an intention to leave the sect. At this point I'm a bit confused about who the parties are. I need to reread this to make sure that I have the facts straight. (Rereads from the beginning.) Ok. This is an action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case came up on the defendant's exceptions. The plaintiff is a member of the sect and the defendant is the head of the sect so Whittaker is the member of the sect and Sanford is its leader.

William was actively involved with the text. Like the professor, he tried to *152 create a mental picture of what had happened, and he tried to predict the court's holding before he read it. Though William did not question his purpose in reading the materials, as he read he assumed the role of a judge, evaluating the credibility of the parties, the merits of their "stories," and applying the law to the facts.

The defendant, with the help of the plaintiff's husband, persuaded the plaintiff to return to the United States aboard the sect's palatial yacht, the Kingdom. The defendant promised the plaintiff that she and her children would be free to leave the ship any time they were in port. After their arrival in Maine, the plaintiff asked to be put ashore with her children and baggage and the defendant refused.

So at this point the defendant is reneging on the promise that he made to the woman in Syria.

There was evidence that the plaintiff had been ashore a number of times, had been on numerous outings and had been treated as a guest during her stay aboard the yacht.

So at this point I'm getting a picture of what happened . . . I'm not sure though. There is evidence that the plaintiff had been ashore so at this point I'm thinking was she really held against her will. So I have doubts, doubts about the plaintiff's story at this point.

According to the uncontradicted evidence, at no time did anyone physically restrain the plaintiff except for the

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 7

defendant's refusal, once the plaintiff announced her decision to quit the yacht, to let the plaintiff use a small boat to take herself, her children, and her belongings ashore.

Well . . . the defendant by this point isn't really stopping the plaintiff from leaving.

Throughout the entire episode the plaintiff's husband was with her and repeatedly tried to persuade her to change her mind and remain with the sect.

At this point, mentally I think, . . . I don't think the plaintiff's story doesn't hold water, . . . that's what I am thinking. Because her husband was there so maybe you know, there's in my mind that her story doesn't hold water. So I am thinking at this point that the court might end up reversing her position.

There are, however, several things that William did not do as he read. He did not attempt to reconcile the rules set out in the Restatement section with the two cases, and he did not try to figure out why the authors *153 had included the note following the first case. In addition, he did not appear to put any of the materials into a historical or social context. He read each piece as if it were the only piece that he was reading and, in determining how he would decide the cases, he considered how he would decide them today, rather than at the time that they arose.

In contrast, Jackie used few of the strategies used by the professor or by Lundeborg's experts. She did not preview the materials and, although she read the names of the cases, she did not read the name of the court or the date of the decision. Furthermore, Jackie did very little rereading, and she did almost no synthesis or evaluation. Instead, most of her statements about the text were close paraphrases.

Jackie also did not question her purpose in reading the cases or assume a particular role. When asked during the interview what she saw as her purpose in reading the material assigned for class, she paused for ten or fifteen seconds, finally responding that it was to identify the important facts, the rules, and the court's holding. To another question, she answered that she did not assume a particular role, for example, that of a judge or an attorney, when she read the assigned materials. She did say, however, that she reads cases differently than when she first entered law school. While initially she focused on what she described as the emotional facts, she now tries not to get involved.

Two other things are noteworthy about Jackie's reading of the assigned material. While initially she seemed to have an easier time understanding the text than William, she later missed one of the key words in the opinion. In reading the text, she mispronounced the word "palatial" and did not appear to recognize the word or its significance to the case. In addition, in her reading of the facts, she was less selective than either the professor or William. For example, when reading the second case, she highlighted the name of the individual who conducted the investigation and the fact that the plaintiff contacted his attorney. When asked during the interview why she had highlighted these particular facts, she stated that she highlighted the name of the company because it was connected to one of the parties and that she highlighted the fact that the plaintiff contacted his attorney because whenever an attorney is involved it might have some legal significance. In contrast, both the professor and William skimmed these two statements, and neither highlighted them. The following is an excerpt from Jackie's think aloud.

Whittaker v. Sanford

110 Me. 77, 85 A. 399 (1912)

Savage, J. Action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case comes up on defendant's exceptions and a motion for a new trial.

This was a trial for false imprisonment. The plaintiff was able to recover or receive \$1100. The defendant is taking exception to the case.

*154 The plaintiff had been a member of a religious sect which had colonies in Maine and in Jaffa, Syria, and of which the defendant was a leader.

This sentence says to me that the defendant was the leader and the plaintiff was a member of a religious sect and this occurred perhaps in Jaffa or Syria.

Some months prior to the alleged imprisonment, the plaintiff, while in Jaffa, announced her intention to leave the sect. The defendant, with the help of the plaintiff's husband, persuaded the plaintiff to return to the United States

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 8

aboard the sect's platial (sic) yacht, the Kingdom.

What this is saying is that with the help of the plaintiff's spouse, she was prevented from leaving to go back to . . . (voice fades).

The defendant promised the plaintiff that she and her children would be free to leave the ship any time they were in port.

The defendant had promised her and the children that they would be able to leave.

After their arrival in Maine, the plaintiff asked to be put ashore with her children and baggage and the defendant refused.

Well, when she got to Maine she and her children were not allowed to exit the ship with their baggage.

There was evidence that the plaintiff had been ashore a number of times, had been on numerous outings and had been treated as a guest during her stay aboard the yacht.

It seems like she had gotten to know the guy.

According to the uncontradicted evidence, at no time did anyone physically restrain the plaintiff except for the defendant's refusal, once the plaintiff announced her decision to quit the yacht, to let the plaintiff use a small boat to take herself, her children, and her belongings ashore.

It looks like he didn't physically restrain her and the children or anybody else, but it looks like he, he wouldn't assist her to go ashore, to go ashore by herself. So it's like there was no physical restraint.

Throughout the entire episode the plaintiff's husband was with her and repeatedly tried to persuade her to change her mind and remain with the sect.

*155 The guy, her husband, was there and tried, and he tried to talk her out of leaving.

The markings that William and Jackie made in their casebooks are consistent with the patterns noted during the think alouds. In William's casebooks, there is a diagram near the beginning of each case identifying the parties, their relationship(s) to each other, and the nature of the cause of action. The rest of the margins are filled with summaries of the text, for example, phrases setting out the key facts, rule, and holding, and William's own comments about the case. There is relatively little highlighting; as a general rule, only the rules and the holding are underlined. In contrast, Jackie wrote very little in her casebook. Instead, she highlighted what she saw as the significant facts and rules and then prepared case briefs for each case. In so doing, she spent most of her time on the facts, setting them out in detail and then paraphrasing the court's decision and the legal principle set out in the case. In none of her casebooks or briefs are there any comments about the cases.

Thus, in reading the cases, William and Jackie not only used different strategies, but they also assumed different roles. William assumed the role of a judge: he created in his mind a picture of what happened and then reacted, weighing, apparently on the basis of his own belief system, the plaintiff's credibility and deciding what the outcome should be. In contrast, Jackie appeared to read the cases as she would any other textbook. In fact, in her one reference to the writer, she used the label "author" rather than "judge" or "court." Her purpose was to gather the information that she needed to complete her case brief.

C. Maria and James

While an analysis of William's and Jackie's protocols suggests a correlation between the use of Lundeborg's strategies and first-year grades, an analysis of Maria's and James's protocols suggests that other factors may also influence performance. Like William, Maria beat the odds; she was in the top fifteen percent of her class at the end of the first semester. However, unlike William, Maria used very few of the reading strategies associated with expert legal readers.

Instead, like Jackie, Maria assumed a limited role in reading the cases. She stated during the interview that her primary goal was "to understand the facts, then to find the rule, and then the reasoning behind the rule." Although she sometimes thought about how she might use the case in practice, she never played the role of judge.

Maria's reading of the cases differed from Jackie's, though, in several important ways. While both Jackie and Maria read for information, Maria's reading was more methodical. She looked first for the parties, then the facts, then the rules, and finally the court's reasoning.

What I just wrote (referring to a note that she wrote in the margin) is that that the plaintiff wants to leave and the

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

FOR EDUCATIONAL USE ONLY

Page 9

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

defendant restrained her. I *156 would write this so that I could go back to it later and have an outline of what happened.

....
To me this is the rule. The court instructed the jury that the plaintiff must know that the restraint was physical and not merely a moral influence.

Maria did not, however, prepare a brief at the time that she read the opinion. Instead, she chose to wait until after class, until she found out what the professor thought was important. In so doing, she was more than willing to defer to the professor's reading of the opinion. As she stated in the interview, "I usually adopt the professor's way (of reading the case.) I guess it is survival. If he says or she says it, it must be right. That is what you need to know for the exam."

In addition, unlike Jackie, Maria recognized all of the words in the text and was sensitive to verbal clues provided by the court. For example, she recognized words signaling that the court was about to present the facts or a rule, and she paid particular attention to the text following words like "but," "moreover," and "especially."

Finally, although Maria did not engage in evaluation, her reading of the text was more selective and more critical than Jackie's. While Jackie highlighted text that was not legally significant, most of the phrases that Maria highlighted were the same phrases that the professor had highlighted. In addition, while most of Maria's statements about the text were paraphrases, she did engage in at least some synthesis. For example, near the end of the first case she made the following comment:

It seems like all along the court was saying that she was falsely imprisoned but now they are saying that she lacked a factor which would make it false imprisonment. But then I'm also thinking that at the same time I don't remember reading in the rule section that you had to have humiliation and disgrace.

James, the other low GPA student, presents an interesting contrast to both Jackie and to the two high GPA students, William and Maria. James stated during his interview that his purpose in briefing cases was to avoid embarrassment if called on in class.

When I read cases, I usually read them not for briefing cases per se, but more out of fear of being called on in class. I don't want to look like a fool so I just want to know the basic principles. I notice when I am sitting in class that as long as the person knows the basic facts, the rule, and how to apply them then anything that the person says it doesn't matter. To me, he answered the question correctly, so I am capable of doing the same thing so I just want to make sure that I don't look like a fool in class.

*157 Because his primary motivation was to avoid embarrassment, when James did not think he would be called on, he spent very little time reading the assignment. James did, however, use some of the reading strategies associated with expert legal readers and he acknowledged others. For example, like William and the professor, James created in his mind a picture of what had happened, and, like Maria, he located the facts, rules, holding, and the court's reasoning. In addition, James often moved between parts of the cases or checked what he had read in a case against the Restatement and, at several points, he created his own hypotheticals.

At this point, I need to look again at the (Restatement). I don't remember seeing the words actual physical restraint.

....
The next time that I think about false imprisonment I'll think about the room (a reference to the analogy used by the court) and I'll know that it will extend to not giving someone a rowboat. Therefore, if there is another hypothetical, let's see, say someone locks someone in a car, I try to see if it is the same type of situation, how it is different and how you could argue either way.

However, unlike the expert legal readers, James did not recognize a number of the words contained in the opinion. For example, like Jackie, he did not recognize the word "palatial." In addition, he misread both the first case and the note following the case. In reading the first case, James read the following sentence to mean that the defendant refused to allow the plaintiff go ashore on only one occasion rather than that the defendant's refusal came once the plaintiff announced her decision to leave the ship.

According to the uncontradicted evidence, at no time did any one physically restrain the plaintiff except for the defendant's refusal once the plaintiff announced her decision to quit the yacht to let the plaintiff use a small boat to

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

FOR EDUCATIONAL USE ONLY

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

take herself, her children, and belongings ashore.

According to the uncontradicted evidence, at no time did any one physically restrain the plaintiff except for the defendant's (pause) defendant's refusal once (pause) the plaintiff announced her decision to quit the yacht to let the plaintiff use a small boat to take herself, her children, and belongings ashore.

Similarly, James misread or misinterpreted the note following the first case, reconciling what appear to be contradictory decisions by deciding that one case dealt with children under the age of eighteen while the other case dealt with adult children. In fact, both decisions dealt with adult children; what the opinions illustrated was that the courts are reluctant to *158 support either the parents by appointing them temporary guardians of their adult children or the adult children by finding that their parents falsely imprisoned them.

Although James was not aware that he had misread this particular text, he was aware that sometimes his understanding of a case differed from that of his professors and classmates. In addition, he acknowledged that sometimes he underlined without reading what he was underlining. While he recognized key words, he did not always read the text following those key words.

In summary, while James used some of the reading strategies associated with expert legal readers, his use of those strategies was flawed. James knew what strategies to use, but he did not use them because the strategies were inconsistent with his goal in reading cases and because he lacked basic reading skills including word recognition and the ability to correctly interpret what was printed on the page.

IV. Discussion

The data set out above suggest several hypotheses. First, they suggest that those students who do well during their first year of law use more of the strategies used by expert legal readers than do those students who do not do as well. For example, William used more of the strategies used by Lundeborg's experts and more "talking back to the text" than did any of the other three students.

The data also suggest another hypothesis. Students who do better than their LSAT scores predict may exceed expectations because they possess one of two types of expertise: they may be adept at using strategies used by expert legal readers or they may read as expert students. In contrast, those who do not do as well do not utilize either type of expertise. Thus, one of the reasons that William performed well was because he was able to use some of the strategies used by expert legal readers, and one of the reasons Maria did well was because she was able to use a strategy associated with good students: she was willing and able to "read" her professors. In contrast, Jackie did not perform well because she did not use the strategies associated with either expert legal readers or expert students, and James did not do well because, even though he knew what strategies to use, he was not able to use them effectively.

There is also a third way to read the data. There may be more similarities between the way in which William and Maria read than the prior hypotheses suggests.

At least four things distinguish William's and Maria's reading of the text from Jackie's and James's. First, William and Maria brought more knowledge to their reading than did Jackie and James. For example, while both William and Maria appeared to know where Syria was and something about its culture, neither Jackie nor James seemed to know anything about the country. In addition, while both William and Maria recognized and appeared to understand the word "palatial," both Jackie and James *159 mispronounced the word and did not appear to know its meaning.

Second, both William and Maria read with a much stronger sense of purpose than did Jackie or James. William read as a judge, and Maria read to find particular information. In contrast, Jackie's reading was more mechanical, and James's reading was controlled by his personal fears.

Third, and perhaps most importantly, both William and Maria appear to share similar beliefs about the way in which meaning is attached to particular texts. They both appear to believe that rather than being fixed, meaning is socially constructed. For example, during his interview, William stated that during a trial, "each side presents its version of the facts" and that the court, by "looking at prior cases, decides how to interpret them." Similarly, Maria

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 11

stated that what she finds intriguing about the law is the fact that "there can be so many different interpretations of what happened," and that the "court gets to decide, by looking to precedent, which interpretation to adopt." In contrast, neither Jackie's nor James's view of text was as well-formed. While Jackie stated that there was probably more than one way of interpreting an opinion, she also stated that if the judge wrote a good opinion, "everyone would probably read it in pretty much the same way." Similarly, James stated that while there was probably more than one way to see the facts or read a case, he usually tried to check his reading against one of the study guides to make sure that he had read the case correctly. In addition, both Jackie and James stated that it was the court's role to determine who was telling the truth.

Finally, William and Maria had similar beliefs about the role of the reader. William's protocol provides evidence of his belief that the reader's role is to construct meaning either from the text itself or from the facts and rules presented in that text. Similarly, Maria's protocol provides evidence that she believes that part of the reader's role is to interpret the text. However, unlike William, she is not yet willing to assume that role herself, instead choosing to defer to the professor's reading. In contrast, both Jackie and James see the reader's role as more limited. The reader's role is simply to decode what the writer writes.

Thus, those students who beat the odds may do so, at least in part, because, like Davies's good legal readers, [FN49] they read for a purpose and they understand that the interpretation given to a particular fact or text depends on the contexts in which the fact appears or the text is read. As a result, they are more willing to use the strategies that Lundeborg [FN50] and Deegan [FN51] described and to read in the manner that Fajans and Falk advocate. [FN52] In contrast, those students who do not beat odds are more likely, either because of their beliefs or their experiences with text, to read simply to decode text.

*160 While James's approach, reading to avoid embarrassment, may be surprising, Jackie's is not. For most students, and particularly for students of Jackie's generation, most if not all of their school reading has been from secondary sources and most if not all of it has been for information. [FN53] For example, despite the fact that she has a B.A. in history, Jackie does not recall ever having read any historical documents; she has only read about them. Thus, Jackie may not have known that she should be reading for meaning and, even if she did, she had limited experience doing so.

Conclusion

Under either reading of the data, the implications are significant, both for the individual students and for the law schools they attend. If additional research establishes that there is, in fact, a significant correlation between the way in which specially-admitted law students read opinions and their success in law school, law schools need to help this group of students learn how to read more effectively. At the time of admission, law schools need to identify those students who lack basic reading skills and to provide them with remedial instruction. In addition, law schools need to "teach" legal reading by familiarizing students with the ways in which lawyers read opinions. Instead of simply asking students to give the facts of the case, professors can think aloud for their students as they read opinions, demonstrating when and how they use the strategies identified by Lundeborg [FN54] and Deegan [FN55] and how they, like Fajans and Falk's better readers, [FN56] question and evaluate the texts that they read. In addition, professors need to adopt teaching methodologies that provide students with the opportunity to read judicial opinions in context and for a specific purpose. For example, professors can put students "in role" more often by asking them to read opinions, not just for class, but to answer a client's question or to write a brief to a court. With such instruction, perhaps all specially admitted students can beat the odds, becoming not only expert legal readers but also expert lawyers.

[FNal]. Director of Legal Writing at Seattle University School of Law. This study was part of the coursework for my Ph.D. in Educational Psychology at the University of Washington. I would like to thank Dr. Samuel Wineburg for his assistance in designing the study and editing the paper, Anne Enquist for her comments, and Lori Lamb for her help transcribing the tapes.

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139

FOR EDUCATIONAL USE ONLY

Page 12

83 Iowa L. Rev. 139

(Cite as: 83 Iowa L. Rev. 139)

[FN1]. See, e.g., Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. Legal Educ. 55, 56 n.4 (1989) (citing David H. Vernon & Bruce I. Zimmer, The Size and Quality of the Law School Applicant Pool: 1982-1986 and Beyond, 1987 Duke L.J. 204, 219-20, for the proposition that minority applicants usually have lower scores on their LSAT than nonminority applicants); see also Linda F. Wightman & David G. Muller, *An Analysis of Differential Validity and Differential Prediction for Black, Mexican American, Hispanic, and White Law School Students: Law School Admissions Council Research Report 90-03*, at 1 (1990) (stating that the LSAT is as valid a predictor of performance for minority students as it is for white students).

[FN2]. See Finke, *supra* note 1, at 67-69. During the 1984-85 school year, one of the students who participated in the University of Oregon's Alternative Admissions Program ranked in the top 1% of the first-year class and another student ranked in the top 10%. During the 1985-86 school year, one of the students in the Alternative Admissions Program ranked in the top 17%. See also Personal Communication from Paula Lustbader, Director, Academic Support Program, Seattle University School of Law (Aug. 1996) (on file with author).

[FN3]. As those who work with students in alternative admissions programs know, almost all of the students in these programs are highly motivated. In fact, it often seems that the least successful students work the hardest.

[FN4]. There have been, however, numerous studies of reading. Although historically most of these studies looked at how beginning readers learn to read, there has been increasing interest in how more proficient readers read not only individual but multiple texts. See, e.g., *Executive Control Processes in Reading* (Bruce K. Britton & Shawn M. Glynn eds., 1987) (examining how cognitive strategies may be used to improve reading speed and retention); Douglas K. Hartman, *Eight Readers Reading: The Intertextual Links of Proficient Readers Reading Multiple Passages*, 30 Reading Res. Q. 520 (1995) (examining the intertextual links which are made by readers); Marlene Scardamalia & Carl Bereiter, *Development of Strategies in Text Processing, in Learning and Comprehension of Text* (Heinz Mandl et al. eds., 1984) (focusing on how young readers overcome comprehension difficulties); Rand. J. Spiro, *Constructive Processes in Prose Comprehension and Recall, in Theoretical Issues in Reading Comprehension: Perspectives from Cognitive Psychology, Linguistics, Artificial Intelligence and Education* 245 (Rand J. Spiro et al. eds., 1980) (examining how the outside meaning that readers assign to language influences their understanding of various texts); Samuel S. Wineburg, *Historical Problem Solving: A Study of the Cognitive Processes Used in the Evaluation of Documentary and Pictorial Evidence*, 83 J. Educ. Psychol. 73 (1991).

[FN5]. See Mary A. Lundeborg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407, 411 (1987) (describing how subjects were encouraged to talk aloud as thoughts "popped into their minds").

[FN6]. *Id.* at 412 (analyzing the different parts of the case that the experts and novices noticed).

[FN7]. See *id.* at 414-15 (describing how the experts evaluated the opinions more than the novices did).

[FN8]. See *id.* at 414 (describing the rereading and underlining pattern of the subjects).

[FN9]. See *id.* (describing the difference in synthesis strategies between experts and novices).

[FN10]. Lundeborg, *supra* note 5, at 414.

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 13

[FN11]. See id. (explaining how approximately half of both groups of subjects underlined on the first reading).

[FN12]. Id. at 412.

[FN13]. Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 Reading Res. Q. 154 (1995).

[FN14]. Id. at 158. Some researchers distinguish between reading tactics and reading strategies. A tactic is a technique such as underlining, notetaking, outlining, summarizing, visualizing or using mnemonic devices. In contrast, a strategy is a "collection of mental tactics employed by an individual in a particular learning situation to facilitate acquisition of knowledge or skill." Suzanne E. Wade et al., *An Analysis of Spontaneous Study Strategies*, 25 Reading Res. Q. 147, 149 (1990) (quoting S.J. Deery & D.A. Murphy, *Designing Systems that Train Learning Ability: From Theory to Practice*, 56 Rev. Educ. Res. 1, 2 YEAR?). A tactic "becomes a strategy only if students have the metacognitive knowledge of when, where, and how to use it." Id. (quoting B.B. Armbruster et al., *The Role of Metacognition in Reading to Learn: A Developmental Perspective* 18 (1983)).

[FN15]. Deegan, *supra* note 13, at 161.

[FN16]. Id. at 160.

[FN17]. Id. at 163.

[FN18]. Id.

[FN19]. Id.

[FN20]. Deegan, *supra* note 13, at 163.

[FN21]. Id. at 164.

[FN22]. Martin Davies, *Reading Cases*, 50 Mod. L. Rev. 409, 409 (1987).

[FN23]. Id.

[FN24]. Id. at 421.

[FN25]. Id.

[FN26]. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of the Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993).

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

FOR EDUCATIONAL USE ONLY

Page 14

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

[FN27]. Id. at 163-64.

[FN28]. Id.

[FN29]. Id.

[FN30]. Id. at 163.

[FN31]. Deegan, *supra* note 13, at 166.

[FN32]. Id.

[FN33]. See, e.g., Corrine Glesne & Alan Peskin, *Becoming Qualitative Researchers* (1992); Matthew B. Miles & A. Michael Huberman, *Qualitative Data Analysis* (2d ed. 1994); see also Jack R. Fraenkel & Norman E. Wallen, *How to Design and Evaluate Research in Education* (2d ed. 1993).

[FN34]. Glesne & Peskin, *supra* note 33, at 7.

[FN35]. Id.

[FN36]. See, e.g., Miles & Huberman, *supra* note 33 (discussing methods of data collection in the context of their impact on analysis).

[FN37]. See, e.g., Peter Afflerbach & Peter Johnston, *The Use of Verbal Reports in Reading Research*, 16 J. Reading Behav. 307, 321 (1984).

[FN38]. See K. Anders Ericsson & Herbert A. Simon, *Protocol Analysis: Verbal Reports as Data* 60-61 (1984) ("By having the subjects verbalize their thoughts at the time they emerged, the difficulties and sources of error associated with keeping thoughts in memory or retrieving them from memory could be eliminated.").

[FN39]. To protect the identity of the students, the students' real names have not been used, and the year that study was conducted has not been indicated.

[FN40]. These LSAT scores placed the students in the bottom 10% of that year's entering class.

[FN41]. The students' LSAT scores and first-year grades were obtained from the law school's registrar with the written consent of the students.

FOR EDUCATIONAL USE ONLY

Page 15

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

[FN42]. James A. Henderson, Jr. & Richard N. Pearson, *The Torts Process* 968- 71 (3d ed. 1988).

[FN43]. *Id.* at 968.

[FN44]. *Id.* at 970.

[FN45]. *Id.*

[FN46]. *Id.*

[FN47]. The six codes were (1) Use of Content, (2) Previewing the Opinion, (3) Rereading Analytically, (4) Underlining, (5) Synthesis, and (6) Evaluation. See Lundeberg, *supra* note 5, at 412.

[FN48]. Three codes were used. Statements that were mere paraphrases of the text were coded as denotative, statements which indicated that the participant was questioning or interpreting the text were coded as connotative, and statements which indicated that the participant was evaluating the text or engaging in synthesis were coded as stereoscopic. The following adjectives which are taken from Fajans & Falk, *supra* note 26, at 205 n.86, were used as a guide in coding.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Id.; see also M. L. Johnson, *Hell Is the Place We Don't Know We're in: The Control-Dictions of Cultural Literacy, Strong Reading, and Poetry*, 50 C. Eng. 309, 314-15 (1988). These codes were used because they provided another, relatively traditional, way of analyzing the participants' reading.

[FN49]. Davies, *supra* note 22, at 418.

[FN50]. Lundeberg, *supra* note 5.

[FN51]. Deegan, *supra* note 13.

[FN52]. Fajans & Falk, *supra* note 26.

[FN53]. See Samuel S. Wineburg & Laurel Currie Oates, *Education's Promise*, 3 Legal Writing J. 1, 2-3 (1997); see also Samuel S. Wineburg, *On the Reading of Historical Texts: Notes on the Breach Between School and Academy*, 28 Am. Educ. Res. J. 495, 496 (1991) (noting that the "historical text" for high school students is "most often a history textbook").

[FN54]. Lundeberg, *supra* note 5.

[FN55]. Deegan, *supra* note 13.

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

83 IALR 139
83 Iowa L. Rev. 139
(Cite as: 83 Iowa L. Rev. 139)

FOR EDUCATIONAL USE ONLY

Page 16

[FN56]. Fajan & Falk, *supra* note 26.

END OF DOCUMENT

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.